No. 80-1262

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In the Supreme Court of the United States

OCTOBER TERM, 1980

SUPREME OPTICAL COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act by discharging five employees for attending an unemployment compensation hearing of a former employee where the employees had received permission from their supervisor before leaving the plant to attend the hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) will be reported at 628 F. 2d 1262. It currently appears as an appendix to 633 F. 2d No. 3 (Jan. 19, 1981). The decision and order of the National Labor Relations Board (Pet. App. 27a-33a) and the opinion of the Administrative Law Judge (Pet. App. 4a-27a) are reported at 235 N.L.R.B. 1432.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-35a) was entered on October 27, 1980. The petition for a writ of certiorari was filed on January 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 30, 1976, a hearing was scheduled before the Ohio Bureau of Unemployment Services to

determine whether Dale Priest, an employee who had been discharged by petitioner, would receive unemployment compensation benefits (Pet. App. 8a-9a). Priest requested five of petitioner's employees to attend the hearing and testify in his behalf (*id.* at 9a). Those five employees obtained permission to attend the hearing from a supervisor (*id.* at 11a); they told him that they would return after the hearing (*ibid.*).

The five employees proceeded to the site of the hearing and, after approximately an hour's delay, each of them testified (Pet. App. 13a-14a). Petitioner was represented at the hearing by its controller and a foreman, neither of whom spoke to any of the five employees (*id.* at 14a). After the hearing, the employees spoke with Priest for about 15 minutes, had lunch, and returned to the plant (*ibid.*). When they returned, they were told by the foreman and plant manager that they had been discharged for attending the hearing (*id.* at 17a).

2. Petitioner was charged with violating Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by "interfer[ing] with, restrain[ing] or coerc[ing] employees in the exercise of the rights guaranteed" by Section 7 of the Act, 29 U.S.C. 157. The Administrative Law Judge, after analyzing the testimony of those involved in the incident, found that a supervisor had indeed given the employees permission to attend the hearing (Pet. App. 6a-8a, 20a) and that petitioner's officials responsible for discharging the employees knew that permission was given (*id.* at 21a). He rejected as a pretext petitioner's assertion that the employees were discharged because their absence caused "production problems" (*ibid.*); he concluded that if petitioner had actually had such difficulties, the foreman who attended the unemployment compensation hearing "would have communicated such problem to the five employees at the time * * * and arrangements would have been made to minimize the time lost in attendance at the hearing" (*ibid.*). Conse-

quently, the Administrative Law Judge found, petitioner had discharged the five employees because they attended the hearing.

The Administrative Law Judge ruled (Pet. App. 19a) that the employees' attendance at the unemployment compensation hearing was "concerted activit[y] for the purpose of * * * mutual aid or protection" within Section 7 of the Act. He explained (*id.* at 19a n.13):

> If an employee is terminated or laid off, such employee is entitled to benefits * * * depending upon whether the termination or layoff is for cause or not. * * * A major protection for employees to see that their own unemployment benefits insurance is meaningful is the willingness of fellow employees to be available to testify as to the relevant issues. An employee who testifies for a discharged emp[illegible]yee as to such issues is in effect testifying in general support and protection of his or her own potential benefits and encouraging other employees to be potential witnesses.

Therefore, the Administrative Law Judge held, petitioner had violated Section 8(a)(1) of the Act (Pet. App. 20a). He ordered that the five employees be reinstated with back pay and that appropriate notices be posted (*id.* at 24a-25a).

The Board affirmed the findings and rulings of the Administrative Law Judge (Pet. App. 27a-28a). It specifically noted that it saw no basis for reversing his determinations on the credibility of witnesses (*id.* at 27a-28a & n.1). It emphasized that "the matter of unemployment compensation benefits arises out of the employment relationship * * * and is one aspect of the national labor policy" (*id.* at 30a). The Board cited its consistent position that " 'it is traditional for employees to help each other and make a common cause so that "each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping" ' " (*id.* at 31a, quoting *Washing-*

ton Forge Inc., 188 N.L.R.B. 90, 97 (1971)). Finally, the Board stressed that in this case the employees had sought and secured permission from petitioner. Otherwise, the Board said, it might not have reached the same result. "[A] balancing of the employee interest in protecting each other against the employer's interest in efficiently operating his business is required and the securing of permission is an important element in making the balance" (Pet. App. 31a n.9). The Board therefore agreed that petitioner had violated Section 8(a)(1), and it endorsed in substance the remedy ordered by the Administrative Law Judge (Pet. App. 32a-33a).

3. The court of appeals enforced the Board's decision. It found substantial evidence to support the Board's conclusion that the employees had been given permission to attend the hearing and that their absence placed "no burden upon [petitioner]" (Pet. App. 3a). The court agreed that in these circumstances—although not necessarily in every case (*id.* at 2a)—the employees' attending an unemployment compensation hearing was protected activity under Section 7. The court explained that "[t]he circumstances of the termination of a particular employee potentially affects the relationship between all employees and their employer. It is reasonable for employees to be concerned about the consequences of their possible termination" (*id.* at 2a-3a).

ARGUMENT

1. Determining whether an employer has violated Section 8(a)(1) often involves two distinct inquiries: whether the employees' activity was protected by Section 7, and whether the employer has "a countervailing interest that outweighs" the employees' rights. See, *e.g.*, *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 563 (1978). Here, as petitioner concedes, only the first inquiry is relevant. The Administrative Law Judge and the Board found both that petitioner gave the five employees permission to attend the hearing and that

petitioner's economic objection to their absence was a pretext. The court of appeals upheld these findings and petitioner does not ask this Court to overturn them.[1] These findings remove any basis for petitioner's asserting an economic interest in limiting the employees' activity. Thus this case does not present the question whether, and in what circumstances, an employer's economic interests might outweigh an employee's interests in attending an unemployment compensation hearing. Petitioner's position is simply that it is entitled under the Act to retaliate against an employee for testifying at an unemployment compensation hearing.

2. This Court has emphasized the deference that is to be given to the Board's definitions of the scope of employees' rights under Section 7. See, *e.g.*, *Eastex, supra*, 437 U.S. at 568-570; *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266-267 (1975). The Board has determined that at least in certain circumstances, Section 7 protects employees who attend an unemployment compensation hearing for a former colleague. The only other court of appeals to have considered the issue agreed with the court below in upholding the Board's position. *NLRB* v. *Painter Tool, Inc.*, 103 L.R.R.M. 2603 (3d Cir. June 12, 1979), enforcing 235 N.L.R.B. 1468 (1978). The Board's position is, moreover, entirely consistent with the decisions of this Court.

a. Petitioner contends (Pet. 16-22) that attending the hearing was unrelated to the employees' "mutual aid or protection" because Priest was no longer an employee. Even if it is assumed that Priest was not an employee within

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[1] Petitioner accepts the finding that it gave the employees permission to attend the hearing (Pet. 5 n.3). While not expressly conceding that its economic rationale for dismissing the employees was a pretext (Pet. 7), petitioner gives no reason for this Court to overrule the finding below on that point and does not argue that its supposed economic justification outweighs the employees' interests.

the meaning of the Act, but see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 191-192 (1941), and that concerted activity to aid a former employee would not be protected by Section 7, but see *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505 (2d Cir. 1942) (L. Hand, J.), petitioner's contention was fully answered by the Administrative Law Judge, the Board, and the court of appeals. As they explained (*e.g.*, Pet. App. 19a n.13, 31a, 2a-3a), by attending Priest's hearing the employees helped assure themselves of similar support from their fellow employees in the future. This Court has repeatedly endorsed the principle that Section 7 is intended to enable employees to promote and maintain "solidarity" of this sort. See, *e.g.*, *Weingarten, supra*, 420 U.S. at 260-261; *Houston Contractors Association* v. *NLRB*, 386 U.S. 664, 668-669 (1967).[2]

b. Petitioner also contends (Pet. 9-16) that the employees' attendance at the unemployment compensation hearing was insufficiently connected to their "interests as employees," *Eastex, supra*, 437 U.S. at 567, to be protected by Section 7. As the Administrative Law Judge (Pet. App. 19a

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[2]There is no merit to petitioner's assertion (*e.g.*, Pet. 12-18) that in this case the employees' statements established that their acts were unprotected. The statement of one employee to the effect that she "didn't have anything against" petitioner and wished only to help Priest's family, a statement which petitioner repeatedly cites (*e.g.*, Pet. 3 & n.1, 10, 15, 18, 24), was made in a discussion with supervisors shortly after the employees learned that they had been discharged for attending the hearing (Pet. App. 18a). Nothing requires employees seeking the protection of Section 7 to renounce all altruistic motives or to declare to their supervisors their antipathy for their employer. Moreover, the employee's statement is consistent with the desire to promote mutual solidarity, which the Administrative Law Judge (Pet. App. 19a n.13), the Board (*id.* at 29a-31a), and the court of appeals (*id.* at 2a-3a) agreed was the justification for the employees' action. In any event, this Court has repeatedly upheld the Board's authority to rule that particular activities are within Section 7 without ascertaining the motives of every employee who engages in those activities. See, *e.g.*, *Eastex, supra*, 437 U.S. at 569-570; *id.* at 565-566 & nn.15, 16 (collecting cases); *Weingarten, supra*, 420 U.S. at 260-261.

n.13), the Board (*id.* at 29a-31a), and the court of appeals (*id.* at 2a-3a) again explained,[3] if a discharged employee cannot obtain the testimony of other employees at an unemployment compensation hearing, the employer's account of the discharge will have a far greater effect on the employee's chances of receiving unemployment compensation benefits. As the Board pointed out (*id.* at 31a), this is especially true where, as here, the employer is represented at the unemployment compensation hearing. The Board, drawing on its "cumulative experience in dealing with labor-management relations" (*Weingarten, supra*, 420 U.S. at 266; see *Eastex, supra*, 437 U.S. at 569-570), concluded that this power in the hands of employers would affect the entire relationship between employers and employees (see Pet. App. 31a). Under *Eastex, supra*, 437 U.S. at 569-570, the Board's conclusion was plainly reasonable and the court of appeals did not err in upholding it.

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[3]Petitioner contends (Pet. 22-25) that under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the court of appeals must be reversed because it enforced the Board's order on the basis of a different rationale from that used by the Board. The rationale attributed to the court of appeals by petitioner (Pet. 23) does no more than paraphrase the reasoning of the Administrative Law Judge (Pet. App. 19a n.13); this reasoning was adopted (*id.* at 27a) and reiterated (*id.* at 30a-31a) by the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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